Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

TANYA ENGLISH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Michael D. Kmetz, Esquire
Counsel of Record
JONES SHELTON & MALONE, P.C.
500 East Main Street
1218 SunTrust Center
Norfolk, Virginia 23510
(757) 640-0003

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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QUESTION PRESENTED

Did the Fourth Circuit Court of Appeals err in affirming the district court's granting of the defendant's motion to dismiss pursuant to FRCP 12(b)(1) and (6) by erroneously interpreting the law?

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner Tanya English is an individual.

Respondent

Respondent is the United States of America.

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Tanya English respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is unreported and is reproduced in App. A at 1a-2a, The opinion and order of the United States District Court for the Eastern District of Virginia is unreported and is reproduced in App. B at 3a-14a. The decision of the court of appeals denying the petition for rehearing *en banc* is unreported and is reproduced in App. C at 15a-16a.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was issued on December 20, 2000; however it was not mailed to counsel's proper address, Counsel requested an extension of time, which was granted, to file a petition for rehearing and suggestion for rehearing *en banc* which was denied by that court on March 20 , 2001. (App. D at 17a-18a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On August 4, 1999, Appellant English filed her lawsuit against the United States of America alleging a claim arising out of the Federal Tort Claims Act, 28 U.S.C. §§ 2671 through 2680. She alleged that she was the wife of an active duty sailor, CTO2 Michael A. English, U.S.N. who was stationed at Northwest Security Group Activity, Chesapeake, Virginia.

That on numerous occasions she called the Command Master Chief, Beverly Fouderon, to advise her of her husband's violent mood swings and to beg that the command get her husband help to protect him and herself. Nothing was ever done and on March 6, 1995, English's husband shot English and turned the gun on himself and killed himself.

Following are the facts: English was married to CTO2 Michael A. English who was on active duty with the United States Navy stationed at Northwest Security Group Activity, Chesapeake, Virginia when, (hereinafter "Command"), on March 6, 1995, she was shot in the face by her husband who then turned the gun on himself and committed suicide. Prior to the infliction of this grievous wound, Appellant had complained to her husband's Command concerning her husband's suicidal ideations and his wide and violent mood swings that included violence and rage towards her. Appellant repeatedly called the Command Master Chief, Beverley Fouderon, to tell her of her husband's violent mood swings and to beg the Master Chief to get her husband into counseling or treatment available through Navy medical facilities because of her fear for her and her husband's safety. Despite these pleas for help, nothing was ever done to effect the counseling or treatment nor to give any aid or comfort to the Appellant or her husband. Since Appellant's husband was on active duty in the United States Navy, the Navy was the sole source and provider for his medical and psychiatric care. The United States Navy was concerned about CTO2 Michael A. English's violent, dangerous and uncontrollable rages to the extent that it banned him from participating in Command sanctioned intramural basketball games. However, the United States did nothing to provide for the medical (psychological) care of CTO2 Michael A. English nor to provide for the Appellant's safety from the violent rages of

her husband which they were well aware.

PROCEEDINGS BELOW

English filed her suit against the United States alleging that the United States was negligent in not protecting her from the violent outbursts and physical threats of her husband. The United States knew of his violent outbursts and took preventative action to protect Navy personnel when the command barred Michael English from further participation in the intramural basketball league.

The United States filed its motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). The district court granted the government's motion . (App. B at 3a-14a).

On appeal to the Fourth Circuit, English urged the court to overrule the district court as to the districts court's misinterpretation of the law and, more particularly, this Court's holding in *Sheridan v. United States*, 487 U.S. 392 (1988). The Fourth Circuit issued its opinion on December 20, 2000 affirming the district court' decision. (App. A at 1a-2a). A request for rehearing and rehearing *en banc* was denied on March 20, 2001. (App. C at 15a-16a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

The Court of Appeals, when reviewing a district court's grant of a Rule 12 (b)(1) motion to dismiss, must assume the truth of the material facts as alleged in the complaint. *Summit Health, Ltd. v. Pinhas* , 500 U.S. 322, 325, 111 S.Ct. 1842, 1844-45,

114 L.Ed.2d 366 (1991); *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87, 89 (4th Cir.1978), *cert. Denied*, 442 U.S. 947, 99 S.Ct. 2895 (1979).

This Court, in *Sheridan v. United States*, 487 U.S. 392 (1988), held that the intentional tort exception to the FTCA is not always a jurisdictional bar to recovery. *Id.* 400-403. In *Sheridan*, this Court agreed with Chief Judge Winter's dissent in *Sheridan v. United States*, 823 F.2d 820 (4th Cir. 1987) and found that:

> "...where government liability is independent of the assailant's employment status, it is possible to discern two distinct torts; the intentional tort (assault and battery) and the government negligence that precipitated it. Where no reliance is placed on negligent supervision or respondeat superior principles, the cause of action against the government cannot really be said to 'arise out of' the assault and battery; rather it is based on the government's breach of a separate legal duty."

Id. at 397-98.

In the case at bar, the United States assumed a duty to protect the Appellant, Tanya English, from the violent and destructive behavior of her husband, CTO2 Michael A. English. Appellant's husband's Command took affirmative precautionary steps to protect its personnel from CTO2 English when they banned CTO 2 Michael A. English from the intramural basketball league due to his explosive and violent outbursts on the basketball court. Thus, the Command knew that CTO2 Michael A. English was prone to violence and would have violent outbursts in the future and was a danger

to himself and others, especially since the Appellant had advised them of his violent temper, threats against her and his suicidal ideations assumed a duty which it owed to the Appellant. By taking steps to protect others from English, the Command took charge of him and exercised control over him during the relevant time periods. This factor is important because under Virginia law, which must be applied in this case, there must exist a particular relationship between the actor and the third party in order for there to be a finding of liability.

The Virginia Supreme Court's holding in *Nasser v. Parker*, 249 Va. 172, 455 S.E.2d 502 (1995) is enlightening on the aforementioned issue. There, the supreme court held that in construing §315(a) of the Restatement of Torts one must look at §§316-19 to determine whether there exists a relationship between the actor and third party which requires the actor to control the third person's conduct. *Id.* at 178. Section 319 provides as follows: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise care to control the third person to prevent him from doing such harm." *Id.*

The Command, under the analysis mandated by the Virginia Supreme Court in *Nasser*, clearly took charge of CTO 2 Michael A. English by the very fact that they controlled his ability to continue playing in the intramural basketball league on the base. In essence, by banning CTO 2 Michael A. English from the intramural basketball league they did so with the intent of protecting other players and members of the Command from his violent and sudden outbursts on the basketball court and to protect them from bodily injury. Additionally, the Navy was the sole source and provider for

CTO2 English's medical and psychiatric care. Thus, according to the rationale of *Nasser* a special relationship was formed between the actor, the United States, and the third party, Michael A. English, to cause the actor to have a duty to the class of prospective victims which includes the Appellant. *Nasser* at 179.

Further, the Virginia Supreme Court in *Dudley v. Offender Aid and Restoration, Inc.*, 241 Va. 270, 401 S.E.2d 878 (1991) held that :

> "a person likely to cause bodily harm to others if not controlled, in the language of Restatement § 319, is a potential threat to all who come within his reach, and in those circumstances, one who takes charge of such a dangerous person incurs a § 319 duty to an entire class of prospective victims. . .to control his dangerous charge."

Id at 279.

The district court's opinion, which the court of appeals affirmed, holds that a "defendant has not taken charge of a third person unless the defendant is vested with a ***heightened ability to control and direct the third party's actions*** (emphasis added). This contemplates active and continuous supervision by the defendant over the third party; a defendant's ability to control the third party only under certain specific circumstances is insufficient to create a special relationship." (App. B at 10a). As a consequence of his enlistment in the United States Navy, CTO2 English was on duty twenty-four hours per day, seven days per week, throughout his enlistment. As such, CTO2 English was subject to the control, in virtually every aspect of his life, by the

United States Navy and his Command. It is axiomatic that the military forces of the United States have world-wide jurisdiction over an active duty service member. *Solorio v. United States,* 483 U.S. 435 (1987). As such, the United States may lodge criminal charges against an active duty member of the armed forces for offenses committed anywhere in the world, whether that service member is on duty or off duty. Thus, the United States has world-wide control of an individual service member for any and all criminal offenses he may commit, twenty-four hours per day, seven days per week, 365 days per year. *Solario* is cited to demonstrate the issue of control of a service member's actions by having the ability to hold that service member liable for his misdeeds. Further, whether CTO2 English was at work, traveling or out at the mall, he was subject to the rules and regulations of the United States Navy, the Department of Defense, the Uniform Code of Military Justice and all lawful orders received from his superiors. As such, the United States was, as the district court held, vested with a heightened ability to control and direct CTO2 English's actions.

The district court also relied on *Thigpen v. United States,* 800 F.2d 393 (4th Cir. 1996) and *Hughes v. United States,* 662 F.2d 219 (4th Cir. 1981). *Thigpen* involved the sexual assault of two young girls by a Navy corpsman in a Navy hospital. *Hughes* involved the sexual assault of two young girls by a postal letter carrier. The Fourth Circuit held, in both cases, that the Federal Tort Claims Act did not waive sovereign immunity for intentional torts and therefore, the district courts properly granted the United States' Rule 12(b)(1) motions.

In the case at bar, while the injuries sustained by the Appellant were sustained in relation to an intentional tort, this Court held that that fact alone does not automatically preclude

the viability of the lawsuit. *Sheridan v. United States,* 487 U.S. 392 (1988). The *Sheridan* Court found that the § 2680(h) exception of the Federal Tort Claims Act is inapplicable to torts committed by a government employee not acting within the scope of his employment, since such torts do not fall under the § 1346(b) waiver in the first instance. *Sheridan* at 401. This Court then held that the negligence of government employees who allow a foreseeable battery to occur could furnish an independent basis for liability under state law. *Id.* at 401-403.

In the present case, the grievous assault took place in the Englishes' off base quarters at approximately 12:30 a.m., a time when CTO2 English was off duty and not performing any official duties. Thus, as the *Sheridan* Court held, there may be an independent basis under state law to proceed on. *Id.*

Under the analysis provided by the Virginia Supreme Court's decision in *Nasser v. Parker,* 249 Va. 172, 455 S.E.2d 502 (1995), discussed *supra.*, there is a cause of action based on the Command's negligence in not protecting the Appellant from CTO 2 English's violent behavior towards her.

The district court's reliance on *Wise v. United States,* 8 F.Supp. 535 (E.D.Va. 1998) is inapposite to the facts of this case as the plaintiff in *Wise* alleged that it was the SEAL training that made the two service members turn into lethal weapons with a sense of heightened invincibility and that the government had a duty to protect people coming into contact with a SEAL and to control their team members. The district court held that there had been no assumption of a duty to the plaintiff. Such is not the gravamen of the allegations in the instant case and that analysis is not appropriate.

Thus, under the analysis of this Court's decision in

Sheridan in conjunction with the Virginia Supreme Court's decision in *Nasser*, the court of appeals erroneously affirmed the district court's granting of the United States' motion to dismiss based upon the foregoing analysis of the facts and the applicable law.

II. THE QUESTION PRESENTED IS IMPORTANT

Since this Court in *Sheridan v. United States, supra.*, raised the issue of the United States' liability for negligence when an intentional tort was involved, there must be a bright line drawn by this Court to avoid the confusion that exists in the various courts of appeals.

Certiorari jurisdiction is warranted to correct this error and clarify the law.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,
TANYA ENGLISH

By: _____

Michael D. Kmetz, Esquire
Counsel of Record
JONES SHELTON & MALONE, P.C.
500 East Main Street
1218 SunTrust Center
Norfolk, Virginia 23510
(757) 640-0003